THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

	)	
The Cape Light Compact	)	Docket No. DTE 01-63
Default Service Pilot Project Plan	)	

COMMENTS OF DUKE ENERGY TRADING AND MARKETING, LLC

Duke Energy Trading and Marketing, LLC, ("DETM") hereby files its comments in response to the Department of Telecommunications and Energy's ("DTE") Notice of Petition of Cape Light Compact for Approval of a Municipal Aggregation Default Service Pilot Project pursuant to Chapter 164 of the Acts of 1997, § 339 ("Petition"). DETM supports the restructuring of the electric industry in the Commonwealth of Massachusetts, authorized by Chapter 164 of the Acts of 1997, G.L. c. 164. Similarly, DETM does not oppose the retail aggregation programs authorized by Section 247, or pilot programs under Section 339, which are designed to facilitate the development of competitive electric markets in Massachusetts. However, DETM does not support The Cape Light Compact Default Service Pilot Project Plan ("Plan") as filed, because the Plan does not comply with the specific aggregation program requirements contained in Section 247 (G.L. 164, § 134), or the specific pilot program requirements in Section 339 of the Acts of 1997. Were the DTE to allow the Plan to go into effect without consideration of the Plan's defects, DETM, as the current supplier for Default Service in the NSTAR Services Company service territory including the entities making up the Cape Light Compact ("Petitioner"), would be unfairly adversely affected. DETM therefore requests that approval and implementation of the Plan be deferred until the Petitioner modifies the Plan to meet the statutory requirements and address the Plan's impact on the existing Default Service supplier.

I. PLAN DOES NOT COMPLY WITH STATUTORY REQUIREMENTS

G.L. 164, Section 134 contains two requirements pertinent to the Petition. First, the service offered by load aggregators must be universal. The statute requires that "[a]ny municipal load aggregation plan established pursuant to this section shall provide for universal access . . ." Second, the price initially offered must be less than the price of Standard Offer Service. The statute requires that "[t]he department shall not approve any such plan if the price for energy would initially exceed the price of the standard offer . . . unless the applicant can demonstrate that the price for energy under the aggregation plan will be lower than the standard offer in the subsequent years or . . . such excess price is due to the purchase of renewable energy." Neither of these requirements has been met.

Petitioner readily admits that the Plan does not satisfy these requirements of G.L. 164, § 134. First, Petitioner notes that the Plan is inconsistent with the earlier submitted and approved Cape Light Compact Aggregation Plan in that the service offered will not be available to all customers of the Petitioner, but only to customers currently receiving Default Service. Plan at 2. Petitioner argues that this limitation on access is "not inconsistent with the law" because Section 339 provides the DTE "broad latitude . . . to establish pilot projects for municipal aggregators . . ." Petitioner, however, does not provide a persuasive rationale for permitting approval of a pilot program that is inconsistent with the requirements of G.L. 164, § 134. If pilot programs under Section 339 need not be consistent with G.L., § 134, there would be little effective limitation on the scope of such pilots. DETM submits that whatever the "notwithstanding any general or special law, rule, or regulation to the contrary" language means, that language is limited by the more specific language that the pilot "implement the provisions of section 134."

This reading of Section 339, that the provisions of section 134 are truly binding, is further supported by the absence of any meaningful limitation, other than the provisions of Section 134, on the scope and content of pilot programs. Specifically, beyond a requirement that the DTE and the Division of Energy Resources establish a pilot program to implement the provisions of Section 134 of Chapter 164, the only other significant requirement of Section 339 is that there be four initial aggregation programs, two municipally sponsored programs and two county or regional sponsored programs, that form the "pilot." However, even this sole additional requirement is not levied on the pilot proponents, but rather on the agencies. This strongly suggests that the pilot contemplated was not the customer-limited sort of pilot proposed under the Plan, but rather a much broader program designed to offer competitive retail service to all of the municipal, county or regional customers covered by the aggregation plan. Thus, when Section 339 refers to a "pilot program to implement the provisions of Section 134 of Chapter 164," it is reasonable to conclude that the General Court contemplated that the "pilot" would be consistent with all of the general requirements set out in Section 134, not just some of them.

Nor, for the same reasons, is there any plausible rationale for allowing the Plan to go into effect in violation of the price threshold established in Section 134. The General Court determined that the aggregation programs under that section would not be approved where the competitive price exceeded the Standard Offer price.[1] Petitioner states in the Plan that the

[1] As noted in Order Instituting Notice of Inquiry/Generic Proceedings into Pricing and Procurement of Default Service, DTE 99-60, dated June 21, 1999, under the Restructuring Act the default service price was to be based on the average monthly market price, but provided no rules for determining that price. In the absence of another method for determining the market price, the standard offer price initially served as the proxy for the market price. DTE 99-60 at 2 of 5. It may be that, at the time Chapter 164 was amended to provide for Default Service, it was contemplated that there would be not distinction between the Standard Offer price and the Default Service price. In any event, the existence of a difference between the price for Standard Offer Service and Default Service does not provide a basis for failing to follow the express provisions of the statute.

reason that competitive service is only being offered to existing Default Service customers is that the statute prohibits the offering of the program to Standard Offer Service customers, and the current competitive price exceeds that Standard Offer Service price. Plan at 1. However, Petitioner does not explain on what basis it may distinguish between Standard Offer Service customers and Default Service customers. The language of Section 134 does not contain any reference to the price for Default Service as a threshold for launching competitive service by aggregators, and in fact cannot provide the basis for doing so. Indeed, linking the initiation of competitive service by aggregators to the Standard Offer price is entirely consistent with, and supportive of, the universal service requirement that competitive service be offered on a non-discriminatory basis to all customers and not a selective subset of customers. Here again, Section 339 should not be read as plenary authority to initiate the Plan even though key details of the Plan violate the express provisions of Section 134.[2] As a result, initiation of the Plan should be deferred until Petitioner modifies the Plan in such a way that it does comply with all applicable statutory requirements.

II. THE PLAN DOES NOT CONSIDER ITS IMPACT ON THE EXISTING DEFAULT SERVICE SUPPLIER

DETM further requests that the DTE consider, in connection with the initiation of the Plan, the impact of the timing of such initiation on the existing supplier of Default Service, in this case DETM. Although suppliers of Default Service can be expected to consider the volume risks associated with in-migration and out-migration between Default Service and competitive service, the automatic switching of 42,000 Default Service customers in the middle of the term of a Default Service supply contract has a substantial financial impact on the supplier. That

[2] While Section 134 authorizes exceptions to this rule if the applicant can demonstrate that prices will fall below the Standard Offer price in the future or prices in excess of the Standard Offer price are based on the purchase of renewable resources, Petitioner has not attempted to make such a showing.

financial impact will vary based on the size of the load being switched and the strength of the supplier in question. However, the ability to attract Default Service suppliers and to attract them at reasonable rates is dependent to some degree on the perception that regulators will consider the impact of program changes and approvals on existing arrangements.

Indeed, in the development of guidelines for Default Service and consideration of modifications, in Dockets DTE 99-60A, DTE 99-60B, and DTE 99-60C, the DTE considered the impact of initiating aggregation programs on existing Default Service suppliers. Specifically, in the Order Addressing Recommendation of the Working Group on Default Service Issues, in Docket DTE 99-60C, dated October 6, 2000, the DTE specifically acknowledged the potential for customers to "game" the system, by switching between Default Service and competitive service. It noted, for example, that under existing guidelines, it is possible for a customer, during a single Default Service term to take competitive service during the first two months when prices were low, switch to Default Service for two months when prices were high, and then switch back to competitive service when prices were again low. The DTE observed that this problem could be mitigated by restrictions on switching during a six-month term. While the DTE found that it did not have sufficient information to evaluate whether these activities are likely to occur, it stated that it "will monitor events as they unfold to determine if this type of 'gaming' occurs as predicted and will revise our policy in the future, as appropriate." Id. at 8-9.

Given this concern, it is striking that there is not a single reference in the Plan to its potential impact on the existing supplier. Indeed, under the Plan not only may individual customers enter and exit from competitive service at will, the program can be terminated with 90 days notice, which could very easily fall within a six-month supply term. Under the Plan, as proposed, DETM could lose 42,000 customers on January 1, 2002, requiring it to dispose of the resources arranged to serve that load, but at the same time be at risk of having to supply that

same load with 90 days notice. At very least, the DTE should require the proponent of a competitive supply arrangement, like the one contained in the Plan, to address the potential adverse impacts on existing suppliers. This requirement would help to assure that the plan is fair and reasonable and provide suppliers with some assurance that their interests will be considered. Since the risk of regulatory action is ordinarily priced into the bids for Default Service, the requirement to address adverse impacts would serve to moderate bids for Default Service. Such a result, DETM believes, would be in the public interest.

III. CONCLUSION

For the foregoing reasons, DETM requests that the DTE defer action on the proposed Plan until the deficiencies described herein are remedied.

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Respectfully submitted,

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